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No. 84-1484

**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1985

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, et al.,

Appellants,

v.

GOULD INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

# REPLY BRIEF FOR APPELLANTS

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## SUMMARY OF ARGUMENT

Wisconsin clearly meets the definitional test of market participant. It directly participates in the market. It chooses a trading partner for the immediate transaction. The NLRA, not

Wisconsin, prescribes appellee's labor relations conduct.

Wisconsin does not claim immunity from constitutional scrutiny as a market participant. The issue is whether Congress has regulated this proprietary choice, not whether it could.

Wisconsin has not violated appellee's first or fourteenth amendment rights. It does not impair appellee's right of access to court: the loss of a customer because of unsuccessful appeals does not obstruct the right of appeal. Awaiting the outcome of the appeals process assures the reliability of the determination of NLRA recidivism. The formula of three violations in five years rationally sets a minimum threshhold for choosing any company as a trading partner.

The NLRA does not preempt. The state is here qua consumer. The NLRA does not proscribe these consumer choices in either the public or private sector; it protects them. Congress has not discriminated by permitting private companies but not the states to choose whether to boycott NLRA recidivists.

Appellee's argument assumes Congress discriminated against the states. Further, its argument succeeds only by ignoring the state's status qua consumer or proprietor. Hence, Wisconsin's consumer choice not to deal with appellee is neither a regulatory burden on its appeal rights nor an addition to the NLRA regulatory remedies.

If the economic consequences of these consumer and proprietary decisions do interfere with the flow of commerce or smooth labor relations, an unlikely

event, Congress is capable of regulating it. It has not done so.

This Court already has held that state proprietary decisions cannot interfere with congressional regulation. United Building and Construction Trades Council v. Mayor of Camden, 104 S. Ct. 1020 (1984). The spending power cases show that proprietary decisions are not regulations. Thus, the real question is whether Congress has regulated proprietary and consumer choices of this sort.

It has not. Even appellee appears to admit that General Motors could make this same choice without offending the NLRA. Therefore, Wisconsin can.

Further, the secondary boycott cases show that the NLRA intends to preserve the freedom of choice of traders, even

states, to do business with each other and as consumers to boycott employers.

Given these principles, appellee's burden is to show that Congress intended to discriminate against states qua consumer and proprietor.

The failure of Congress to debar NLRA recidivists from federal contracts does not show discrimination. It does not "regulate" rights of other consumers and proprietors. It is not an unmistakable withdrawal of a sovereign attribute. Legislation that fails to pass seldom is meaningful of anything, especially here: the particular proposal was a small part of a large NLRA overhaul that failed only by filibuster.

There being no congressional regulation of consumer and proprietary choices in the NLRA, preemption is impossible. Preemption assumes competing

state and federal regulation. But there is no federal regulation of proprietary choices. And there is no state regulation: there is a state proprietary choice.

Preemption could be found only if this Court expands the doctrine in two respects: (a) to reach previously unregulated proprietary and consumer choices of states (but not others) and (b) to insulate NLRA employers from economic boycotts for its recidivism, but only if done by states. There is no basis in the NLRA for this unprincipled expansion.

Even if the boycott is sufficiently regulatory to bring it within traditional preemption law, the controversies in the two forums are not identical. The NLRB cannot order Wisconsin and Gould not to do business with each other. Wisconsin

does not grant employes any relief from unfair labor practices.

This dispute is uniquely for the Congress. It has not clearly ousted the states from this kind of activity. It can address the problem, if it thinks there is a problem.

## ARGUMENT

### I. Wisconsin Acts As A Market Participant

#### A. Wisconsin does no more than choose a trading partner

Appellee takes no issue with Wisconsin's contention that it meets this Court's definitional test for market participant status, viz., the "'single inquiry [of] whether the challenged "program constitute[s] direct state participation in the market."'" White v. Massachusetts Council of Const. Employers, 460 U.S. 204, 208 (1983). Nor

does it doubt that Wisconsin acts to "determine the parties with whom it will deal," White, 460 U.S. at 218, 221-22 (White and Blackmun, JJ., dissenting), that its decision is a "refusal to deal with particular parties," South-Central Timber Development, Inc. v. Wunnicke, 104 S. Ct. 2237, 2246 (1984), that Wisconsin's role in the market is "to supply its own needs," Reeves, Inc. v. Stake, 447 U.S. 429, 452 (1980) (dissenting opinion), nor that its statute addresses the purchases needed only for its own "end use." Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 824 (1976) (dissenting opinion). Thus, Wisconsin meets the test of a market participant.

Nor does appellee directly challenge this Court's rule that the states have the same liberty of contract rights as a

private entity, simply as a matter of "[e]venhandedness." Reeves at 439.

However, appellee does assert that (1) unlike General Motors, Wisconsin is subject to various other constitutional inhibitions such as the first, fifth, and fourteenth amendments (Br. at 33), and (2) a state may not use its market participant rights to regulate conduct outside the market. (Br. at 35, 37.)

The first proposition is conceded. But it is unhelpful to analysis. The act is market participation even if it is subject to other constitutional restraints.

The second proposition is equally unhelpful. It begs the questions whether Wisconsin's act "regulates" and whether it regulates "outside" its market.

Wisconsin focuses on the immediate transaction of selecting a trading partner. That is the market.

So long as Wisconsin deals only with the "immediate transaction" of selecting a vendor, the "effect of regulating employment" is irrelevant. Wunnicke, 104 S. Ct. at 2244. And the "immediate transaction" need not be limited to furthering economic protectionism. This Court has not upheld local favoritism because it likes parochialism or its ripple effect on other interests, but because the state has "greater interests as a 'private trader' in the immediate transaction ...." Id. at 2246.

Appellee would divert attention from the immediate transaction. It argues that, even if Wisconsin fits this Court's definitional test of a market participant, it has exceeded its intended

scope because, by boycotting NLRA recidivists, Wisconsin "impose[s] conditions ... that have a substantial regulatory effect outside of that particular market." Wunnicke, 104 S. Ct. at 2245-46.

But a boycott imposes no conditions. It regulates nothing. It prescribes no rules of permissible or impermissible labor relations conduct. It refuses to trade.

Basing the boycott decision on compliance with federal regulation remains a trading partner decision, not regulation of what is permissible in labor relations. See amicus AFL-CIO brief at 21. Like Maryland in Hughes, Wisconsin is "a purchaser ...; Alaska, on the other hand," imposed a downstream trading choice for its purchaser: "if he buys timber from the State he is not free

to take the timber out of state prior to processing." Wunnicke, 104 S. Ct. at 2244.[1/] The only market Wisconsin controls is its own decision from whom to buy its goods to meet the needs of the state. Appellee remains free to make its own trading partner choices. The NLRA, the NLRB, and the federal courts -- not Wisconsin -- prescribe appellee's labor relations conduct.

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1/ The amicus NLRB similarly obscures the fact that the market is that of choosing a trading partner. See its brief at 25 n. 18. Wisconsin's boycott of the recidivist's products, even when distributed by another, remains confined to the choice of selecting a trading partner. The offensive portion of Alaska's scheme, in contrast, was to "restrict the post-purchase activity of the purchaser, rather than merely the purchasing activity." Wunnicke, 104 S. Ct. at 2246. Wisconsin controls only its own purchasing activity. As the dissent stated in Reeves at 450: "In procuring goods and services for the operation of the government, a State may ... remove itself from the reach of the Commerce Clause."

Equally diverting is appellee's suggestion that the boycott is a regulation because it hopes to spawn compliance with federal regulation. But in no way is a boycott a "regulation." The argument evades this Court's rule that the single point inquiry is whether the program constitutes direct state participation in the market. White at 208.

This selection decision, originating in the perceived impropriety of spending tax dollars to enable law violators to flourish, does not lose its market participant character because it also hopes to positively affect law-abiding conduct. Boston's decision, to hire contractors with resident employes only, did not lose its market participant character because it impacted on the businesses and hiring practices of out-

of-state contractors. White. Maryland's decision, to subsidize local dealers, did not lose its character despite the consequence of reducing the flow of commerce. Hughes. South Dakota's decision, to sell cement only to its residents, did not lose its character despite the result of increasing prices and cutting off trade. Reeves. The states' programs addressed the immediate transaction, as here.

The spending power cases illustrate the fallacy of appellee's premise that a market participant decision is invalid if it influences the conduct of others. Although the state could not constitutionally prevent an abortion, it could choose not to fund it, "'thereby influencing the woman's decision ....'" Harris v. McRae, 448 U.S. 297, 314 (1980). Also see Oklahoma v. United

States Civil Serv. Comm., 330 U.S. 127, 143-44 (1947) (Congress could require a state to remove employes in federally funded jobs for engaging in political activity, though it could not impose the requirement directly). Cf. Fullilove v. Klutznick, 448 U.S. 448, 473-74 (1980) (spending power may induce conduct).

Consequently, Wisconsin's market participant act is not regulatory. It concerns direct state participation in the market and the immediate transaction of choosing a trading partner.

> While the line between governmental and proprietary function is none too sharply drawn ... , one principle remains fixed: the letting of public contracts, particularly those providing for internal needs of government, is a proprietary function.

American Yearbook Company v. Askew, 339 F. Supp. 719, 721 (M.D. Fla.), aff'd. without opinion, 409 U.S. 904 (1972).

B. Wisconsin has not violated the first or fourteenth amendments

Appellee contends Wisconsin has violated its first amendment right of access to court by chilling its decision whether to appeal an adverse decision of the NLRB. (Br. at 20 n. 8.) Wisconsin, of course, does not boycott anyone for the act of appealing. The fact that a result of the appeal may be appellee's loss of a customer no more obstructs the appeal than the refusal to pay for an abortion obstructs the abortion. See Harris v. McRae, 448 U.S. at 316 and n. 19.

For equal protection arguments, appellee asserts the boycott decision is not rationally related to a permissible state objective: it does not address the number or gravity of NLRA violations,

only the results after the appeals process, if any; it operates uniformly on all companies regardless of size or divisional structure; and the purpose of promoting compliance with the NLRA is not a permissible state purpose. (Br. at 20 n. 7.)

Wisconsin could have scaled the violations in relation to the various factors appellee mentions. But its uniform selection of three violations, after the appeals process is exhausted, rationally could be seen as setting a minimum threshold for any company regardless of size and structure, above which Wisconsin would look for a different trading partner. And awaiting the outcome on appeal assures the reliability of the adjudication. Promoting compliance with the NLRA, while not a permissible regulatory objective,

is a self-commending proprietary decision to not add to the wealth of law violators with tax dollars.

## II. The NLRA Does Not Preempt The Choices Of Market Participants; It Protects Them

Appellants' thrust is this: the state is here qua consumer. The NLRA does not regulate consumer choices. The NLRA protects consumer choices. The NLRA does not discriminate against the states as consumers.

Appellee's argument reduces to this: states do not have equal rights as private proprietors and consumers under the NLRA, even when making proprietary and consumer choices, because the states are states.

Nowhere does appellee doubt that the NLRA lets General Motors make the same decision Wisconsin has made.

Nowhere does appellee show that, whereas the NLRA gives General Motors this right, it denies it to the states.

Nowhere does appellee show that Congress discriminated against states as consumers.

Thus, appellee is helpless to show that the NLRA departs from this Court's presumptions (1) that "States themselves [may] operate freely in the free market" and (2) that simply as a matter of "[e]venhandedness ... when acting as proprietors, States should similarly share existing freedoms from federal constraints ...." Reeves, Inc. v. Stake, 447 U.S. 429, 437, 439 (1980).

Appellee simply ignores the states' status qua consumer and qua proprietor. For example, its argument regarding appeal rights turns away from state proprietary buying decisions to focus on

state police power regulations (Br. at 20-21.) This argument can fare no better than its first amendment argument. The legislative decision not to subsidize the exercise of even fundamental constitutional rights does not infringe the right. Regan v. Taxation With Representation of Wash., 461 U.S. 540, 549-50 (1983). Moreover, Wisconsin does not act because an appeal was filed. Unlike Nash v. Florida Industrial Commission, 389 U.S. 235 (1967), the state there denied unemployment compensation benefits for filing an unfair labor practice charge. But (a) Wisconsin does not respond to the filing but to the adjudicated results and (b) its refusal to do business is a proprietary choice and not a regulatory welfare program.

Amici Chamber of Commerce and NLRB also ignore the state qua consumer. They raise the spectre of interference with the flow of commerce, the effectiveness of NLRB remedial machinery, and the amicable resolution of collective bargaining disputes. They suppose the fifty states and numerous municipalities, who have enormous buying power, might choose not to deal with recidivists. The spectre is speculative, of course. Moreover, at best it makes a case why Congress might choose to prevent these consumer boycotts. It is unresponsive to whether Congress has done so.

> Even if it should be proved that states have a direct financial stake in a broad range of private concerns, we feel that a determination that states must be treated differently from private companies because of the pervasiveness of their financial interests is itself

> the type of policy decision which should be made by Congress ....

Amalgamated Transit Union, Div. 819 v. Byrne, 568 F.2d 1025, 1029 (3rd Cir. 1977) (en banc) (an NLRA, state-spending decision case).

Appellee says this Court already has pretermitted these boycotts. It relies on the holding in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959), that preemption applies to state rules "regardless of the mode adopted." All such expressions by this Court, however, have been in the regulatory context. By ignoring the states qua consumers, appellee would expand the preemption doctrine, not apply it.

The Board directly confronts this Court's holding that, if the state acts as a market participant, "no conflict

between state regulation and federal regulatory authority can arise." United Building and Construction Trades Council v. Mayor of Camden, 104 S. Ct. 1020, 1028 (1984) (emphasis the Court's). So the Board says it is "fatuous" for Wisconsin to say it imposes no "penalty" but only tells the vendor to take its business elsewhere. (Board Br. at 14.) But that follows from the Camden holding, which is not fatuous. In contending otherwise, the federal government only impeaches its own arguments, repeatedly and successfully made, that a sovereign may use its spending power to do indirectly what it cannot do directly. Those cases can mean only one thing: proprietary choices are not regulations.

The real question, then, is whether Congress has regulated these consumer and proprietary choices.

Congress has not regulated consumer or proprietary, trading partner choices under the NLRA. Wisconsin is as free as General Motors to make this choice. In resisting this conclusion the amici and appellee make essentially three points: (1) Wisconsin, unlike General Motors, is subject to the Supremacy Clause; (2) the NLRA forbids statutory employers from violating the NLRA rights of employes by means of a proprietary choice (AFL-CIO Br. at 11); and (3) Wisconsin's economic boycott is inimical to the secondary boycott policies of the NLRA. (Board Br. at 23 n. 16.)

The first point is unresponsive. Of course, Wisconsin is subject to the Supremacy Clause and General Motors is not. But the Supremacy Clause does not come into play unless the NLRA has come

into play, viz., by regulating the choice of picking a trading partner.

The second point turns on itself. To be sure, a statutory employer may not use a proprietary right as a ruse to discriminate against employes in violation of the NLRA (AFL-CIO Br. at 11.) But the states are expressly excepted from the statutory definition of "employer." 29 U.S.C. sec. 152(2). Moreover, the Act does not reach the proprietary choice as such: it reaches that choice if used to violate employes' NLRA rights, and only if the proprietor has control over the employment relationship. See Austin Co., 101 NLRB No. 197, 31 LRRM 1215 (1952). Indeed, even the same amicus concedes that nothing in the NLRA "remotely touches" the right of one employer to refrain from

doing business with another. (AFL-CIO br. at 20.)

The third point is in error. The NLRA protects these consumer choices. First, the secondary boycott policies of the NLRA relate only to union coercion, not employer or consumer choice. See 29 U.S.C. sec. 158(b)(4). Second, the reason unions may not engage in secondary boycotts is to preserve the "freedom of choice ... whether to refuse to deal with another or to maintain normal business relations ...." Local 1976, U.B.C. & J. v. NLRB, 357 U.S. 93, 105 (1958).

There is no doubt that the NLRA treats Wisconsin as a consumer who can refuse to buy Gould's goods. Assume a union of Gould's employes distributed handbills in front of a state-owned hospital explaining that it had a dispute with Gould, advising that Wisconsin used

Gould's products, encouraging consumers not to use the goods the hospital had purchased from Gould, and appealing to state officials to terminate dealings with Gould. This union appeal would be lawful. See NLRB v. Servette, 377 U.S. 46, 51 (1964). It follows Wisconsin could agree with the union not to use Gould's goods in its hospital. Appellee's argument, however, would mean the states (not other proprietors or consumers) are preempted from so agreeing with the union. This contradiction in its argument is aggravated, not diminished, by saying Wisconsin acts as a consumer in making this agreement with the union but is not a consumer when it boycotts Gould as a matter of its own policy.

The amicus Board similarly contradicts itself. It suggests that an

agreement between Wisconsin and a Gould union not to deal with Gould violates the hot-cargo ban in the NLRA. Sec. 8(e), 29 U.S.C. 158(e) (Its br. at 23, n. 16). But the Board has ruled that a union and a state agency may enter into hot-cargo agreements because the states are not statutory employers. IBEW, Local 3 (N.Y. Electrical Contractors Ass'n), 244 NLRB, No. 46, 102 LRRM 1285 (1979).

Unquestionably Wisconsin as a consumer could voluntarily agree with Gould's union not to deal with Gould. As a consumer, Wisconsin can unilaterally make the same decision.

The right of liberty of contract, while not absolute, has been called "inalienable." Frisbie v. United States, 157 U.S. 160, 165 (1895). This right includes the "independent discretion" to choose a trading partner. United States

v. Colgate & Co., 250 U.S. 300, 307 (1919).

States have this right: "Even where 'integral operations' are not implicated, States may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal." Reeves, Inc. v. Stake, 447 U.S. 429, 438 n. 10 (1980).

> The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else--including the judiciary--deems state involvement to be.

Garcia v. San Antonio Metro. Transit Authority, 105 S. Ct. 1005, 1015 (1985).

Despite the states' sovereign prerogatives and the well-ensconced right of liberty of contract which they enjoy, appellee effectively says Congress has

dictated with whom the states may or may not choose to do business. But it is precisely this kind of fundamental state right that will not be deemed overridden absent a congressional declaration that is unequivocal, compelling, or unmistakable.

Nothing in the failure of passage of the federal debarment proposal constitutes an unequivocal or unmistakable congressional divestment of state trading partner choices. As a general matter, unsuccessful legislative attempts are unreliable guides to legislative intent. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 n. 11 (1969). This is especially so here where appellee looks to a 1978 proposal as bearing on the meaning of the NLRA enacted some thirty years earlier. Additionally, the debarment proposal was

but one pea in a much larger pod of proposals to make major changes in the NLRA. It passed the House but was defeated by a filibuster in the Senate. See Willmore, NLRB Rulemaking, 89 Yale L.J. 982, 987 (1982); Rosen, Labor Law Reform: Dead or Alive? 57 University of Detroit Journal of Urban Law 1 (1979). Its failure of passage is meaningless as to the doctrine of NLRA preemption, as an intent to change the right of states to choose their trading partners, or as an intent to discriminate against the states. In no event is it a "regulation" of others' proprietary or consumer choices.

There being no federal regulation of state proprietary or consumer choices, a source for preemption becomes elusive. Garmon applies only if a sec. 7 or sec. 8 NLRA regulation is involved. There is

none. All parties and amici appear to agree that the second branch of the NLRA preemption doctrine of Machinists v. Wisconsin Empl. Rel. Com'n., 427 U.S. 132 (1976), is inapposite.

Appellee would have this Court expand preemption to insulate it from economic boycotts for its recidivism, but only from state boycotts. But an economic boycott is not a regulatory "penalty." It tells the law violator to take his business elsewhere. It is expressive economic activity which is generally protected. See NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

Since the NLRA does not regulate state consumer or proprietary choices, even if based on NLRA conduct, it hardly can be said to "preempt" the state qua consumer or qua proprietor.

## III. NLRA Preemption Would Not Apply In Any Event

The appellee and amici take issue with appellants' assertions that the controversies presented to the two forums are not identical and that Gould's business opportunities with Wisconsin are only of peripheral concern to the NLRA. They say Wisconsin invades the remedial scheme that is within the exclusive domain of the NLRB, that Wisconsin has no nonlabor interest to serve, that its residents never were affected by the particular unfair labor practices, and that Wisconsin acts only to punish NLRA violators.

But the controversies are not identical. The Board may not order

Wisconsin and Gould not to do business with each other. Wisconsin does not determine the merits of the labor dispute. Wisconsin does not remedy any injury to the bargaining relationship.

Appellee mistakes the nature of the decision -- a refusal to do business -- with the conditions for its exercise -- adjudicated unfair labor practices. This Nation, as well as the several states, is engaged in a policy debate as to whether to economically boycott a far away land that endorses racial apartheid. The nature of that decision is moral, social, and proprietary. It remains so even if Americans themselves have not been victimized by the racism, even if economic inefficiencies result, and even if the decision responds to an

underlying condition, racism, that cannot be regulated.

The question for the NLRA is how to cure the unfair labor practices. The question for Wisconsin is whether to reward the violators by awarding them contracts.

These interests are generically distinct. If the sovereign power to make this policy choice is to be evicted, it is for the Congress to say so unequivocally, not for this Court to do so.

The issue in this case is peculiarly for the Congress to resolve. Affirmance of the Seventh Circuit would have two severe consequences: (1) it would

abridge the generally recognized principle of liberty of contract of consumers and traders to choose a business partner, and (2) it would infringe on state sovereign choices: the court below did order Wisconsin to do business with Gould.

Each result should give pause. The NLRA preemption doctrine is an especially unwarranted basis for this invasion. Justice Frankfurter referred to the doctrine as "Delphic." International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958). Oracular vision is inappropriate here. Congress can speak up if it wants to limit these valued rights.

## CONCLUSION

It is respectfully submitted that this Court should reverse the judgment of

the court of appeals insofar as it affirms the judgment of the district court that the state statutes in question are unconstitutional.

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